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# LEGAL/LEGISLATIVE ISSUES IN EUTHANASIA AND PHYSICIAN- ASSISTED SUICIDE

EDWARD GRANT\*

Recently, the Commission on Death and Dying established by the State Legislature of Michigan voted nine to seven, with four critical abstentions, to support assisted suicide.<sup>1</sup> The debate in Michigan illustrates virtually all of the current manifestations of the "right to die" movement. Michigan passed legislation specifically directed towards blocking the loophole that permitted Dr. Jack Kevorkian to actively partake in a number of assisted suicides.<sup>2</sup> There have subsequently been both constitutional<sup>3</sup> and procedural<sup>4</sup> challenges to this assisted-suicide law. Dr. Kev-

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<sup>1</sup> FINAL REPORT OF THE MICHIGAN COMMISSION ON DEATH AND DYING (1994) [hereinafter FINAL REPORT]. The Commission also voted, nine to five with six abstentions, to support a series of procedural safeguards if the legislature decides to legalize assisted suicide. *Id.*; see also Edward Walsh, *Michigan Committee Backs Allowing Assisted Suicide*, WASH. POST, Apr. 26, 1994, at A1 (summarizing Committee's findings and recommendations).

<sup>2</sup> MICH. COMP. LAWS § 752.1027 (1993); see also *Michigan Suicide Bill Advances*, N.Y. TIMES, Dec. 14, 1994, at A18.

<sup>3</sup> See *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995) (holding that state has power to impose criminal penalties on one who assists in suicide).

<sup>4</sup> See *Hobbins v. Attorney General*, 1993 WL 266833 (Mich. Cir. Ct. 1993); see also Judy Pasternak, *Court Orders Kevorkian Murder Charges Revived Death*, L.A.

orkian has used at least three of these challenges in his defense against the various criminal proceedings brought against him.<sup>5</sup> In addition, a more comprehensive lawsuit has also been brought by the American Civil Liberties Union challenging the legislation.<sup>6</sup>

The Michigan legislation prohibiting assisted suicide contained a sunset provision closely tied to the work of the Commission.<sup>7</sup> The provision provided that the suicide ban would lapse six months from the date of the Commission's report, June 8, 1994.<sup>8</sup> During this six-month period, the State Legislature had three options: (1) adopt the Commission's recommendation; (2) retain the current ban; or (3) adopt some modification thereof.<sup>9</sup>

The Michigan Commission's proposal recommended the authorization of physician-assisted suicide for people over the age of eighteen suffering from "a terminal illness or a condition involving irreversible suffering."<sup>10</sup> The measure required that a physician be present at the suicide which was to be preceded by a detailed process involving consultation with another physician, a psychiatrist or psychologist, a social worker and an expert in

TIMES, May 11, 1994, at 4 (reporting that circuit court invalidated statute based on legislative procedure); Judy Pasternak, *Kevorkian is Acquitted For Role in Suicide*, L.A. TIMES, May 13, 1994, at 1.

<sup>5</sup> See John Lorabee et al., *Kevorkian Lawyer Seeks Churches as Suicide Sites*, DETROIT NEWS, May 9, 1995, at A1; Rogers Worthington, *Kevorkian's Trial May Obscure Issues*, CHI. TRIB., Apr. 24, 1994, at 3.

<sup>6</sup> See Robert A. Destro, *The Scope of the Fourteenth Amendment Liberty Interest: Does the Constitution Encompass the Right to Define Oneself Out of Existence?*, ISSUES IN LAW AND MED., Sept. 22, 1994, at 183 (explaining ACLU's position and legal theory regarding lawsuit).

<sup>7</sup> See MICH. COMP. LAWS, § 752.1027 (5) (1993). This subsection provided that section 752.1027 would repeal itself effective "six months after the date the Commission makes its recommendations to the legislature." *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> On Dec. 13, 1994, the Michigan State House voted 67-35 to permanently ban assisted suicide. *Michigan Court Upholds Ban on Assisted Suicides*, CHI. TRIB., Dec. 14, 1994, at 16. The House also added an amendment that would give Michigan voters the final say on assisted suicide in November 1996. *Id.* The Senate had previously passed the permanent bar but rejected the voter referendum. *Id.*

<sup>10</sup> FINAL REPORT, *supra* note 1, at 2. A "terminal condition" is defined as "an incurable or irreversible condition which will, in the certified opinion of a physician exercising reasonable medical judgment, result in death within six months." *Id.* at 5. An "irreversible suffering condition" means "an irreversible, progressive, debilitating or degenerative disease with no time of death able to be determined reasonably but with subjectively unbearable or unacceptable suffering emanating from a physical condition." *Id.* at 5-6.

pain management.<sup>11</sup>

These "safeguards" reflect the degree of ambivalence many people demonstrate when they consider the right to die issue. It is considered by many that the right to die is a necessary avenue of mercy for the most extreme cases.<sup>12</sup>

Nevertheless, it is also recognized that the potential for abuse exists.<sup>13</sup> Society may be uncomfortable with the idea of putting too much power in the hands of doctors who would actively participate in the killing of their patients.<sup>14</sup> To overcome these insecurities, the Hemlock Society, the ACLU, and other advocates of physician-assisted suicide and euthanasia play upon the underlying sentiment that as long as the appropriate safeguards exist, the potential risks can be curtailed by legalizing and regulating mercy killing.<sup>15</sup> In short, these advocates theorize that we can titrate the amount of mercy killing or physician-assisted suicide that is minimally necessary to take care of the most severe cases.<sup>16</sup> A letter recently published with the approval of Ann Landers is typical of this sentiment:

Wouldn't it be wonderful if there were a hospice-like place where a person could go when all hope of independent living was gone? A place where one could voluntarily end his or her own life?

I envision a place staffed with people whose duty is to talk things over with those who come and make certain those individuals fully comprehend what they are about to do. The staff would then assist them in taking the final steps.

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<sup>11</sup> *Id.* at 7-9.

<sup>12</sup> See Rosie Sherman, *Bioethics Debate*, NAT'L L.J., May 13, 1991, at 1 (reporting results of poll finding 80% of respondents would want their life support terminated if they were in coma with no chance of recovery).

<sup>13</sup> See Brad Hayward, *Doctor Assisted Suicide Divisive Topic, Poll Finds*, SACRAMENTO BEE, Mar. 19, 1995, at A3 (reporting poll finding many respondents oppose doctor-assisted suicide when doctor is heavily involved in process).

<sup>14</sup> See *id.*

<sup>15</sup> See Destro, *supra* note 6; see also J. ROBERTSON, *THE RIGHTS OF THE CRITICALLY ILL: THE BASIC ACLU GUIDE TO THE RIGHTS OF CRITICALLY ILL AND DYING PATIENTS* (1993) (explaining the ACLU's interpretation of law on this issue and offering model statutes); Carol J. Castoneda, *Aided Suicide Ban Faces Challenge, ACLU Says the Decision to Die an Individualized Right*, USA TODAY, Mar. 1, 1993, at 6A (explaining basic stance of ACLU and Hemlock Society on issue of doctor-aided suicide).

<sup>16</sup> See *supra* note 15; see also FINAL REPORT, *supra* note 1.

The place I envision would allow us to exit this life in a dignified, painless, peaceful manner.<sup>17</sup>

This proposition might likely engender the majority support of the American people in a public opinion poll.<sup>18</sup> However, sentiments such as this may be deceptive. Even a vote by the Michigan Commission on Death and Dying in support of physician-assisted suicide should not escape the scrutiny this issue demands.

While the Commission's proposal includes some safeguards that would make access to physician-assisted suicide very difficult, it nevertheless contains certain flaws.<sup>19</sup> First, despite the Commission's effort to represent a broad spectrum of citizens, professional organizations and advocates with a stake in this issue, in reality the 9-to-7 vote reflected four critical abstentions, namely, that of the Michigan State Medical Society, the Michigan Hospital Association, the Citizens for Better Care and the Michigan Non-Profit Homes Association.<sup>20</sup> In order to represent the true public opinion on this issue there are four groups whose approval would be deemed essential: physicians, hospitals, senior citizens and the handicapped. Without these four groups it would not be possible to state that the opinions gathered represent the interests of those with the most at stake in this debate. Therefore, without the approval of these groups in the Commission's recommendations, the authority of the recommendations is greatly diminished. In Michigan, these four groups either abstained or were not present at the vote.<sup>21</sup> Perhaps the logic of the assisted-suicide proposition was simply not persuasive to them.

Further evidence that the euthanasia proposition loses luster upon closer examination are the results of the two statewide

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<sup>17</sup> Ann Landers, *85-year-old Makes Plea for Death with Dignity*, HOUS. CHRON., Oct. 7, 1993, at 2.

<sup>18</sup> See, e.g., *Poll Respondents OK Euthanasia for Terminally Ill, Californians Oppose Aided Suicide in Other Cases*, SAN FRAN. CHRON., Mar. 29, 1995, at A7 (reporting and analyzing California Field Poll on doctor-assisted suicide); Hayward, *supra* note 13 at A3 (detailing poll results indicating majority support for some form of assisted suicide for terminally ill).

<sup>19</sup> See FINAL REPORT, *supra* note 1, at 7-9 (detailing mandatory consultation with attending and consulting physicians as well as other professionals).

<sup>20</sup> See FINAL REPORT, *supra* note 1 (detailing votes rendered on Model Statute Report). In addition, the American Association of Retired Persons and The Michigan Association for Retarded Citizens were not present at the vote. *Id.*

<sup>21</sup> See FINAL REPORT, *supra* note 1.

referenda that have addressed the issue in recent years.<sup>22</sup> These are Initiative 119 in Washington in 1991,<sup>23</sup> and Proposition 161 in California in 1992.<sup>24</sup>

The state of Washington would appear to be the ideal jurisdiction to take the euthanasia proposition to the public. The population is both liberal and libertarian,<sup>25</sup> and early opinion polls showed that church membership and attendance are among the lowest in the nation.<sup>26</sup> Support for Proposition 119's legalization of "aid-in-dying" was initially in the landslide range until an important shift occurred.<sup>27</sup>

Spurred by a media campaign on both sides and extensive coverage in newspapers and broadcast outlets, the people of the state examined the Proposition and found it wanting.<sup>28</sup> Edito-

<sup>22</sup> See, e.g., Don Colburn, *Euthanasia? Doctors in Survey are Split*, WASH. POST, July 14, 1994, at Z5 (reporting survey of Washington doctors on issue of euthanasia, analyzing results in context of Proposition 161 and Initiative 119).

<sup>23</sup> See, e.g., Carol M. Ostrom, *Assisting in Suicide is Immoral, Say Group's Critics*, SEATTLE TIMES, May 21, 1993, at B1 (analyzing possible reasons why Initiative 119 failed).

<sup>24</sup> See, e.g., Lori Olszewski, *Right to Die Law Apparently a Loser*, SAN FRANCISCO CHRON., Nov. 4, 1992, at A12 (reporting defeat of Proposition 161).

<sup>25</sup> See, e.g., Ross Anderson, *Republicans and Democrats: Celebrating the Difference, Whatever it Might Be*, SEATTLE TIMES, Oct. 21, 1990, at 14 (interpreting survey results as showing majority of those polled as liberal-leaning independents).

<sup>26</sup> *Church Membership Low in State Study Notes Growth Nationwide, Least Affiliation in West*, SEATTLE TIMES, July 5, 1992, at H1.

As early as April 1991, news reporters were predicting that Washington residents would pass the initiative. See Robert Steinbrook, *Support Grows for Euthanasia; Medical Killing Runs Against Thousands of Years of Professional Tradition, But Interest is Increasing as Advances Allow Doctors to Prolong Life, and Sometimes, Patients' Suffering*, L.A. TIMES, Apr. 19, 1991, at A1. Other newspapers reported public opinion largely in favor of the euthanasia proposal. See Carleton R. Bryant, *Ballot on 'Death With Dignity' Puts Vital Decision up to Washington State*, WASH. TIMES, Nov. 1, 1991, at A4 ("[r]ecent polls show public opinion running 2-to-1 in favor of the bill among the state's 2.5 million registered voters"); John Balzar, *Washington State Voters May Grant the Right to Die*, L.A. TIMES, Oct. 6, 1991, at A1 (reporting that public opinion polls revealed two-thirds of Washington voters support euthanasia); Charles Laurence, *Poll on a Matter of Life and Death*, DAILY TELEGRAPH, Nov. 4, 1991, at 13 (reporting one day before Initiative 119 went to vote, "opinion poll signals are that it will succeed").

<sup>27</sup> See Bryant, *supra* note 26, at A4 (2-to-1 in favor of initiative); see also Balzar, *supra* note 26, at A1 (two-thirds supporting euthanasia). But see *Washington Voters Reject Doctor-Assisted Suicide*, GANNETT NEWS SERVICE, Nov. 6, 1991 (reporting Harvard University-Boston Globe poll found 64 percent of Americans support doctor-assisted suicide).

<sup>28</sup> Organizations who mobilized in opposition to the initiative included Washington's medical, hospital and nursing home associations as well as the Catholic

rialists and 54% of the people who voted "no"<sup>29</sup> reached the conclusion that Initiative 119 did not contain adequate safeguards.<sup>30</sup>

Conference and fundamentalist religious leaders. See Balzar, *supra* note 26, at A1. These staunch opponents helped to organize a "vote-no" campaign, which raised money to launch a media blitz to communicate their opposition. *Id.* Moreover, a survey of over 1,000 Washington state doctors found that 60% opposed the use of lethal injections and 70% were unwilling to participate in aiding another's death. See Steinbrook, *supra* note 26, at A1. Further, religious leaders from as far away as New York received attention for their moral and ethical opposition to Initiative 119. See Laurence, *supra* note 26, at 13 (reporting Cardinal John O'Connor's fiery sermon at St. Patrick's Cathedral in New York, as well as Rabbi Ronald Price's disapproval, "Many voters' minds were reportedly changed by a heavy barrage of television and radio advertisements featuring strong emotional appeals."); *Washington State Rejects Euthanasia*, FACTS ON FILE WORLD NEWS DIGEST, Nov. 7, 1991. This media campaign focused on increased pressure to get the elderly "out of the way," the misdiagnosis of people as terminally ill, and Washington state becoming a haven for people to end their lives. *Id.*

<sup>29</sup> Although an off-year election, over 1.3 million Washingtonians turned out at the polls, to vote on initiative 119. Fifty-four percent (701,440) voted against the initiative and 46% (606,039) voted for it. See Jane Gross, *Voters Turn Down the Mercy Killing Idea*, N.Y. TIMES, Nov. 7, 1991, at B16.

<sup>30</sup> The ballot read only: "Shall adult patients who are in a medically terminal condition be permitted to request and receive from a physician aid-in-dying?" See *The Voters Anguish Over Death*, N.Y. TIMES, Nov. 9, 1991, at A22 (opining that initiative failed in part because it was "too broadly worded and contained too few safeguards"); Derek Humphry, *Tactical Errors Defeated Washington Suicide Initiative*, STAR TRIB., Nov. 15, 1991, at 23A (arguing public did not want euthanasia laws that did not include adequate safeguards). But see Michael Hirsley, *Euthanasia Vote Heartens Bishops*, CHI. TRIB., Nov. 13, 1991, at 18 (reporting national conference of Bishops attributing defeat of initiative 119 to many meetings mobilizing Catholics and others, as well as voter registration drives). Some reporters and commentators proposed that Dr. Jack Kevorkian's assisting of two suicides two weeks before the Initiative vote affected the eventual vote in Washington on election day. See Humphry, *supra* at 23A ("[t]he specter of maverick doctors 'on call' to assist the suicides of people ... was potentially raised"); J.B. Sibbison, *Euthanasia Referendum Voted Down*, LANCET, Nov. 16, 1991, at 1261 (quoting head of Washington chapter of Hemlock Society that Kevorkian's actions "put a face on the fear of an unstable physician' doing the same thing in Washington state"). The bottom line, it is submitted, was that many feared "it could lead to involuntary euthanasia ... it would give more control to physicians." See *The Voters Anguish Over Death*, *supra*, at A22.

Editorials printed during the weeks before the vote on Initiative 119 questioned the adequacy of safeguards built into it. See Shawn Rohrbach, *Aids Patients Threatened*, SEATTLE TIMES, Oct. 24, 1991, at A19 (opining safeguards in place will not prevent erosion of human life); see also *Aid-In-Dying Initiative is Dangerously Flawed*, USA TODAY, Nov. 4, 1991, at 12A ("Many flaws remain. Many questions are unanswered."). This editorial pointed to the lack of definition between suicide and euthanasia, as well as the lack of a defined procedure to actually administer the death of a person. *Id.* See Edward Larson, *Washington State: The Nevada of Death?*, SEATTLE TIMES, October 31, 1991, at A11. Larson's editorial stressed that without basic safeguards, such as a required doctor-patient relationship, or a required suffering of pain unable to be managed by drugs, the initiative would make Washington

Interestingly, many of the safeguards judged insufficient in Initiative 119 are repeated in the Michigan Commission's proposal.<sup>31</sup>

The fate of California's Proposition 161 was strikingly similar, right down to the identical 54-46 vote that eventually defeated it.<sup>32</sup> After being ahead 2-1 in early polls, the Proposition, ironically, received negative press from the media.<sup>33</sup> All major newspapers in the state sided against the Proposition and identified the following problems in their editorials.<sup>34</sup>

Foremost, Proposition 161 would enable "aid-in-dying" to be administered to anyone diagnosed with a "terminal condition," which is defined as a condition where death is expected within six months.<sup>35</sup> The critics pointed out that medical diagnoses and prognoses are often imprecise. Thus, they run the risk of killing those with a longer life expectancy, or perhaps with no terminal illness at all.<sup>36</sup>

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a reckless "death capital" where people could come to die, not unlike elopers come to Las Vegas to marry. *Id.* See also Kathy Olmstead, *Initiative 119 — Vulnerability Would Increase*, SEATTLE TIMES, Oct. 31, 1991, at A11 (arguing against initiative because it lacks safeguard of family notification). But see *Initiative 119 — Safeguards Have Been Included to Protect Terminally Ill Patients*, SEATTLE TIMES, Oct. 8, 1991, at A11, and *Dying Deserve a Choice*, USA TODAY, Nov. 4, 1991, at 12A (both arguing that Initiative 119 has adequate safeguards, such as establishing mental competency, and requiring two-doctor certification and two non-family witnesses to aid-in-dying request).

<sup>31</sup> See FINAL REPORT *supra* note 1.

<sup>32</sup> See Olszewski, *supra* note 24, at A12; Frank Jones, *Euthanasia Boosters Aim to Kill Our Compassion*, TORONTO STAR, Nov. 9, 1992, at D1 (reporting that Californians voted down Proposition 161 by 54 to 46 percent). The Proposition, if passed, would have permitted doctors to kill dying adults who were mentally competent by lethal injection. See Olszewski, *supra* note 24, at A12.

<sup>33</sup> The Dallas Morning News reported one week before the vote that polls found Californians 2-to-1 in support of Proposition 161. *Life or Death: California Ballot Issue Raises Profound Questions*, DALLAS MORNING NEWS, Oct. 23, 1992, at 26A.

<sup>34</sup> The three major newspapers in California, the Los Angeles Times, the San Diego Union-Tribune, and the San Francisco Chronicle, all took strong stands against Proposition 161. See *Death on Demand Voters Should Reject Proposition 161*, SAN DIEGO UNION-TRIB. Oct. 28, 1992, at B8 [hereinafter *Death on Demand*]; *Election Recommendations: Candidates and Propositions*, L.A. TIMES, Nov. 3, 1992, at B6 [hereinafter *Election Recommendations*]; Debra J. Saunders, *They'll Hold the Door Open if You'll Go*, SAN FRAN. CHRON., Oct. 12, 1992, at A20; see also *Physician-Assisted Death: Is this Measure the Answer? Prop. 161 — A Good Try, but It'd be Better to go back to the Drawing Board*, L.A. TIMES, Oct. 14, 1992, at B6.

<sup>35</sup> 1992 Cal. Legis. Serv. 161 (West).

<sup>36</sup> "Who knows, for example, when someone is six months away from dying? Doctors rarely claim such certainty." *Doctor-Assisted Suicide Needs Patient Safeguards*, USA TODAY, Oct. 13, 1992, at 14A; see *Election Recommendations*, *supra*



Second, allowing physicians to participate in killing their patients is contrary to the healing mission of the medical profession.<sup>37</sup> While this is not a "safeguards" argument, it reflects

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note 34, at B6 (finding the Proposition, "allow[ing] anyone with a life expectancy of six months" lacking in terms of safeguards and prone to abuse); see also *Death on Demand*, *supra* note 34, at B8 (expressing concern over hastening death for patients with "six months to live" and an eventual expansion to nine or twelve months); cf. *Life or Death; California Ballot Issue Raises Profound Questions*, *supra* note 33, at 26A (questioning whether patients mistakenly labeled as "terminal" under Proposition, even though their pain could be managed and their lives continued).

<sup>37</sup> The Hippocratic Oath, developed centuries ago by the Ancient Greeks, still provides the ethical framework for those in the healing profession today. See L. EDELSTEIN, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION AND INTERPRETATION* (1943); see also Nelson Lund, *Infanticide, Physicians, and the Law: The "Baby Doe" Amendments to the Child Abuse Prevention and Treatment Act*, 11 AM. J.L. & MED. 1, 8-9 (1985) ("The Hippocratic Oath embodies a coherent and comprehensive scheme of ethical principles which has proven highly durable despite the many impressive technological advances seen by the profession."). Under the Oath, physicians are required not to impair or worsen a patient's condition. *Id.* See Susan M. Wolf, *Quality Assessment of Ethics in Health Care: The Accountability Revolution*, 20 AM. J.L. & MED. 105, 112 (1994). That portion of the Oath relevant to euthanasia states, "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, give advice which may cause his death." STEDMAN'S MEDICAL DICTIONARY 650 (24th ed. 1982). Thus, preservation of life is of fundamental importance under the Hippocratic Oath. See John L. Capone, *Bartling v. Superior Court: The Final Transgression of a Patient's Right to Die?*, 35 CASE W. RES. L. REV. 764, 790 (1985).

Many newspaper articles and editorials called into question the California euthanasia Proposition on Hippocratic and other ethical grounds. See Loretta M. Cargill, *Prop. 161 Support Cause for Sadness*, LOS ANGELES TIMES, Sept. 20, 1992, at B9 ("It is a sadder day [for society] when physicians who supposedly live by the Hippocratic Oath condone any physician's participation in murder."); *Death on Demand*, *supra* note 34, at B8 (opining most doctors do not want "ethical burden" of being "agents of both life and death"); Hugh Dellios, *California Vote May Boost Euthanasia*, CHI. TRIB., Oct. 11, 1992, at 4 (reporting that passage of Proposition will have profound impact upon Oath and on how Americans view dying).

In addition, when Oregon voters approved a physician-assisted suicide initiative last year, the AMA Board of Trustees appointed a task force to help fight these burgeoning state efforts. Diane M. Gianelli, *States Weigh Assisted Suicide: AMA Launches More Aggressive Action to Fight Trend*, AM. MED. NEWS, Feb. 27, 1995. Task force Chairman, Thomas R. Reardon, M.D., commented, "[W]e feel it is unethical for physicians to participate in physician-assisted suicide. It's against what our role as healers has always been. We should maintain that role and not take part in the active killing of a patient." *Id.*

Although respected for thousands of years, some have criticized the use of the Hippocratic Oath, as well as the validity of its underlying foundation. One law review article found that the Hippocratic Oath can be traced to members of the Pythagorean cult, and that prohibitions against, *inter alia*, euthanasia are inconsistent with the practices of that time. Ben A. Rich, *Postmodern Medicine: Deconstructing the Hippocratic Oath*, 65 U. COLO. L. REV. 77, 88-90 (1993). It asserted that most

something more fundamental — an appeal to a foundational or constitutive ethic of the healing professions.<sup>38</sup> This objection could also be phrased from a perspective that poses a direct challenge to the legal profession. A proposal of this type, drafted by attorneys and considered by a legislative body comprised mainly of attorneys, could be viewed as an effort by the legal profession to undermine the constitutive, ethical foundation of the medical profession. As attorneys wrestle with the assisted-suicide issue, they should take a moment to contemplate this possibility.

There are certain constitutive values of the legal profession.<sup>39</sup> They are found in the Code of Professional Ethics, the Constitution, and the Bill of Rights.<sup>40</sup> Yet they can also be found

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Greek doctors performed acts of euthanasia during the time of Hippocrates. *Id.* Another work suggested a different moral structure to deal with death in the modern era. See PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT (1983). A doctor in California who reportedly assisted patients' deaths believed that "[t]he Hippocratic Oath is really not the final word any more than the Ten Commandments ... [p]eople have always suffered in the end." Paul Jacobs, *Quietly, Doctors Already Help Terminal Patients Die*, LOS ANGELES TIMES, Sept. 29, 1992, at A1. Finally, the man most frequently associated with the euthanasia movement because he has admittedly assisted many deaths in Michigan, Dr. Jack Kevorkian, recently offered some interesting insight on his view of the Hippocratic Oath:

Everyone quotes this silly Hippocratic Oath. And I say "silly" with emphasis. First of all, it doesn't matter anymore. I don't think there's a medical school in the country that gives it. Maybe one or two. I didn't take it. That was in '52. The Oath is not a medical document. Based on historical research ... the Hippocratic Oath is a religious document concocted by the Pythagorean sect, which was a tiny sect ... and a little loony, I might say too.

Dr. Jack Kevorkian, Address at the National Press Club (Oct. 27, 1992).

<sup>38</sup> See *supra* note 37 and accompanying notes.

<sup>39</sup> For instance, one such value is to provide competent and thorough legal representation to a client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). Another is that a lawyer shall be loyal to his client and not represent other clients if such representation presents a conflict of interest. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). Yet another basic tenet among lawyers is the need for adequate legal services for the poor. See Roger C. Cramton, *Why Legal Services for the Poor?*, 68 A.B.A. J. 550 (1982).

<sup>40</sup> The rules and statements that embody the values of the legal profession are found in many places, including cases, statutes, rules of procedure and ethical codes promulgated by bar associations. See Stephen Gillers & Roy D. Simon, Jr., REGULATION OF LAWYERS xiii (1992). The most influential of these writings are those rules drafted by the American Bar Association, which include the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. *Id.* Moreover, some states, including New York and California, have adopted their own

in terms of traditions and codes that are far more ancient than any of these sources. Under the common law, there are certain actions that lawyers cannot undertake and certain actions that lawyers cannot remain silent in the face of. One such fundamental precept is that lawyers cannot be indifferent to injustice.<sup>41</sup> If that precept were proposed to be abolished, if somehow lawyers were asked to be blind to injustice on behalf of an alleged greater good to society or the individual, most would rightly respond: "Perhaps that is a proposal worth debating, but it is not something that I can do as a lawyer. If you take that precept away from us you will have taken away a constitutive element of our profession — and asked us to cease functioning as members of that profession." As segments of the legal profession seek to attack the analogous principles of the medical profession, lawyers should realize that they have a special obligation to speak out on behalf of their medical colleagues.

A third objection raised by the opinion leaders in California was that Proposition 161 granted too much power to a single physician. For example, the Proposition provided no requirement that a physician's decision to kill a patient be reviewed. Moreover, no witnesses were required to document a patient's

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rules. *Id.*

The Constitution, that seminal document upon which the rule of law is firmly established, clearly frames our legal goals as a society:

We The People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

<sup>41</sup> Law is a unique profession insofar as its members constantly assess and reassess their role and function in the profession. Lawyers are constantly striving to do what is "just" or "right" within their ethical framework, always looking to remedy a "wrong" or "injustice." See generally Gillers & Simon, *supra* note 40; see also Cramton, *supra* note 39, at 550 (advocating need for legal services for poor, to bring justice to individuals who are hurt, troubled, unfortunate, and dispossessed); Robert J. Kutak, *A Commitment to Clients and the Law*, 68 A.B.A. J. 804 (1982) (Chairman of Evaluation of Professional Standards Committee discussing upcoming major revisions to Rules of Professional Conduct); cf. John C. Shepard, *Celebrating our Legal Heritage*, 71 A.B.A. J. 4 (1985) (advocating that "the continuation of the highest standards of professional ethics and performance is one of the most important obligations of our great American Bar Association"); A.B.A. *Journal Roundtable, The Profession Identity Crisis*, 80 A.B.A. J. 74 (1994) (roundtable discussion by prominent lawyers discussing need of profession to balance profit motive with values designed to give back to society).

declaration of intent.<sup>42</sup> The Proposition also failed to include any provision for informed consent.<sup>43</sup>

Yet a further objection to the California Proposition was the absence of a definition for an "enduring request."<sup>44</sup> One of the planks in both the Washington and California proposals was that the request for aid in dying had to be accompanied by an "enduring request." The requirement prohibited a physician from acting upon a single request.<sup>45</sup> The question that arose, however, was, what constituted an "enduring request?" Is an "enduring request" one that lasts a week, a month, or a year? The legislation provided no answer to this important question.<sup>46</sup>

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<sup>42</sup> While witnesses are supposed to aver that the declarant "appears to be of sound mind and under no duress, fraud, or undue influence," the law specifies no methods or standards (or even any affirmative obligations on the witness) for substantiating this statement. Most significantly, this protection applies only to the directive (which may be executed years before the active euthanasia), whereas no witnesses are mandated at the time of the actual request for euthanasia. Alexander Morgan Capron, *Be Sure to Read the Fine Print: Will California Legalize Euthanasia*, COMMONWEALTH, Sept. 25, 1992, at 6. Further, the California Proposition, while requiring two witnesses to sign a patient's request for euthanasia, does not require these witnesses to be present when the patient is put to death. See John E. Yang, *Californians Will Decide Tuesday if Physicians Can Help Patients Die*, WASH. POST, Oct. 29, 1992, at A14; *'Dying with Dignity Act' is flawed, Bioethicist Says*, BUS. WIRE, Oct. 26, 1992; see also Alexander Capron, *Even in Defeat, Proposition 161 Sounds a Warning*, HASTINGS CENTER REP., Jan. 1993, at 32 (reporting that while Proposition required witnesses for directives executed by patients in advance, "no witness was needed at the time of the actual request for euthanasia or when it was performed").

<sup>43</sup> "Informed consent" requires a "physician ... to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable care would disclose to his patient ...." BLACK'S LAW DICTIONARY 779 (6th ed. 1990). The informed consent argument could be viewed as a toothless one. A provision for informed consent could easily be added but how could one be certain, without a very strenuous review, that the decision to end the patient's life was really taken under fully informed circumstances, considering all the psychological factors, including any pressure, duress or undue influence resulting from family members, or even financial factors.

<sup>44</sup> An "enduring request" is one that is "expressed on more than one occasion." Paul Jacobs, *Proposition 161: Outcome of Death Measure May Rest on 11th-Hour Ads*, L.A. TIMES, Oct. 28, 1992, at A3.

<sup>45</sup> CALIFORNIANS AGAINST HUMAN SUFFERING, THE CALIFORNIA DEATH WITH DIGNITY ACT § 2525-16 (1992).

<sup>46</sup> It is unclear what "enduring" means, and this has led to speculation and criticism in the press. See Valerie Richardson, *California to Vote on Grim Initiatives*, WASH. TIMES, Oct. 25, 1992, at A15 (quoting Jann Taber, spokeswoman of No on 161: "[a] person could say, 'Kill me now! Kill me now!' and that would be an enduring request"); see also Susan Gilmore, *Will Foes' Efforts Doom California's Euthanasia Bill?*, SEATTLE TIMES, Oct. 24, 1992, at A14 (advancing same proposi-

Besides the issue of safeguards, there are fundamentally moral issues at stake in the assisted-suicide debate. As Catholics, it is sometimes difficult for us to make these arguments because of cultural or religious obstacles. Nevertheless, this is not a line of argument that we, as Catholics, should be embarrassed to pursue. Interestingly, this argument was eloquently stated by the *Jewish Bulletin of San Francisco* (the "*Jewish Bulletin*") in its editorial against Proposition 161, published in September of 1992.

First, the editorial suggested: "As Jews we should oppose this measure. We are taught that only God gives life and only God can take it away. That doctors can't take life and that nurses can't, that individuals can't take their own lives. We also believe that life is a gift from God." The editorial goes on to comment that life and all of its gifts are "on loan from God and are not for us to surrender at our will. It is not our task to decide when those talents have been used up." The editorial then makes the critical argument that:

[W]e should also oppose this measure as Americans. As members of a society founded with the ideals that every life is considered precious and sacred, legalized euthanasia jeopardizes our moral structure because it rationalizes killing and as the country with the best technology for killing we can't afford to do that.<sup>47</sup>

Weimar Republic doctors undertook the practice of eugenics for forced sterilizations, but that led to the idea that some lives are not worth living. Before long, German society fell down the slippery slope of moral accountability and started pushing people into the gas chambers. First, those with physical handicaps, when the Nazis determined they weren't leading quality lives. Gays, lesbians, gypsies and Jews were next as part of Hitler's final solution.

As a society we have big problems with death. We don't show enough compassion for the dying. Too many people with AIDS die in a cold antiseptic hospital bed without family. However, instead of jumping into a moral morass by legalizing euthanasia, we need to learn how to compassionately deal with death.

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tion as Taber).

<sup>47</sup> JEWISH BULLETIN OF SAN FRANCISCO, Sept., 1992.

Despite the sentiments expressed in the *Jewish Bulletin*, despite the misgivings expressed by a majority of voters in California and Washington, despite the misgivings implied in the Michigan Commission on Death and Dying through its ambivalent 9-to-7 vote in favor of a limited proposal for physician-assisted suicide, despite all of these sentiments, the notion of physician-assisted suicide is one that is not going to disappear.

One reason for the debate's omnipresence is an underlying sentiment of support for euthanasia in the country at large, although the strongest opposition to euthanasia in public opinion polls is, in fact, found among minorities and the elderly.<sup>48</sup> Organized groups such as the Hemlock Society, National Council on Death and Dying (formerly "The Society for the Right to Die"), and other organizations will continue to push the issue.<sup>49</sup> Presumably these organizations will begin with more modest proposals and then continue to expand upon them. Euthanasia proponents have, in fact, retrenched from the California and Washington proposals. The revised position embraced both physician-assisted suicide and voluntary active euthanasia, to yield a proposal limited to physician-assisted suicide, but where the doctor supposedly has a passive role and does not administer the agent of death.<sup>50</sup> This was the basis of the proposal passed

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<sup>48</sup> See Capron, *supra* note 42, at 32. This piece reported that while highly educated white voters only slightly opposed Proposition 161, black and hispanic voters defeated the Proposition by a large 20 percent margin. *Id.* The report opined that "less powerful people," including the elderly, "felt themselves more at risk ... fearing ... euthanasia might be used against them ...." *Id.* Similarly, commentators on Initiative 119 in Washington also voiced skepticism over minority support for euthanasia. See Janny Scott, *Suicide Aid Focus Turns to California*, L.A. TIMES, Nov. 7, 1991, at A3 (reporting that California's low-income and minority groups likely to oppose euthanasia measures).

<sup>49</sup> Supporters of Initiative 119, after its defeat, including the leadership of the Hemlock Society, vowed to continue their fight for physician-assisted suicide, calling the defeat a "temporary setback." Warren King, *Both Sides Claim Victory in 119 Vote*, SEATTLE TIMES, Nov. 7, 1992, at A3. Over a year later, members of the board of Washington's chapter of the Hemlock Society established "Compassion in Dying," a group formed with the express goal of helping terminally ill people commit suicide. See Warren King, *Group Forms to Help the Dying Commit Suicide*, SEATTLE TIMES, May 4, 1993, at D1.

<sup>50</sup> See, e.g., Richard L. Worsnop, *Court Ruling Won't Quiet Assisted-Suicide Debate, Poll Sees America Closely Divided Though Many Prefer More Hospices*, STAR LEDGER, May 21, 1995, at 1. ("Proposals to legalize assisted suicide have qualified for the ballot in three states over the past four years — Washington (1991), California (1992) and Oregon (1994). Only the Oregon measure was approved, however,

by voters in Oregon in the form of a referendum in November 1994.<sup>51</sup> The plan is clearly to get more modest proposals in place that seem to engender more support at the ballot box.<sup>52</sup> In any

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and it is on hold while it is being challenged in U.S. District Court.”); Karen A. Korzick & Peter B. Terry, *Perspective: Calling Killing Therapy*, BALTIMORE SUN, May 28, 1995 (stating that Maryland State Legislature considered House Bill 933, Terminal Illness-Physician Aid in Dying, which would make it legal for physician to provide patient with knowledge and agents necessary for suicide, and defeated it. More attempts are expected to follow.); Glenn Adams, *House Slams Door on Assisted Suicide Bill*, BANGOR DAILY NEWS, June 14, 1995 (noting that bill to allow physician-assisted suicides, modeled after Oregon’s voter-passed assisted suicide law, was rejected by Maine House, however, because it included many safeguards, such as statutory counseling, 15-day wait between request and providing prescription, and consideration of other options, “it clearly was a respectable showing for the issue,” said Rep. Fred Richardson D-Portland).

<sup>51</sup> Oregon voters passed a ballot initiative called Death with Dignity Act on November 8, 1994 making it legal for physicians to prescribe lethal medication for terminally ill persons. See *Ergo! Booming Right to Die Legislation Across USA*, P.R. NEWSWIRE, Feb. 8, 1995, available in LEXIS, Nexis Library, PR File [hereinafter *Booming Right to Die Legislation*]. But see *Lee v. State*, 869 F. Supp. 1491 (D. Or. 1994). Measure 16, passed by Oregon voters in 1994, is currently preliminarily enjoined awaiting implementation pending decision in U.S. District Court as to whether the measure violates due process. Physicians, terminally ill patients, and residential care institutions sued the state of Oregon challenging the constitutionality of Measure 16 which authorizes physician-assisted suicide for the terminally ill, the first such law in the U.S.

In addition to the Oregon referendum, there has been a recent flurry of legislative activity in the euthanasia debate. *Booming Right to Die Legislation*, *supra*, available in LEXIS, Nexis Library, PR File. Senior citizens in California agreed that Assemblywoman Diane Martinez would carry their aid-in-dying law in the coming session. *Id.* The California law is almost identical to Oregon’s. *Id.* Hearings were scheduled to begin in New Hampshire in February of 1995 on a bill introduced by Representative Bob Guest. The bill is similar to Oregon’s prohibiting lethal injection, mercy killing or active euthanasia. *Id.* In Washington, Senator Cal Anderson introduced the Terminally Ill Patient Act which, if passed, would allow limited physician-assisted suicide. *Id.* A bill has also been introduced in the Massachusetts legislature permitting a dying patient to receive assisted death via a lethal prescription after consultation with three doctors, one of whom must be a psychiatrist. *Booming Right to Die Legislation*, *supra*, available in LEXIS, Nexis Library, PR File. Wisconsin was scheduled to begin hearings in March on a physician-assisted suicide bill introduced by Representative Frank Boyle and Senator Fred Risser. *Id.* The New Mexico legislature received a death with dignity law in February, 1995, which has a broader sweep than the Oregon law. *Id.* In addition to those six states which have taken the euthanasia debate to the legislature, at least one, Colorado, has chosen the referendum route. *Id.* Colorado Representative, Peggy Lamb, recently introduced a bill asking the legislature to authorize a referendum of the citizens to sample public opinion on physician-assisted suicide in that state. *Id.*

<sup>52</sup> See Carol I. Castaneda, *Group May Split over Right-To-Die*, USA TODAY, June 2, 1995, at 3A. After a decade of fighting to legalize doctor-assisted suicides, Hemlock Society USA is considering a dramatic change in direction. The Board of Hemlock voted 7-0 to change its “mission statement” to include that “all mentally

event, debates over physician-assisted suicide are likely to continue. If not Jack Kevorkian himself, there will always be people like him who constantly push the legal envelope, and there will always be others who choose to operate within the mainstream of medical practice and legality.<sup>53</sup>

Dr. Timothy Quill, a physician at the University of Rochester in New York, is an example of the latter category.<sup>54</sup> If Kevorkian is viewed as the *bete noire* of the euthanasia movement, then Dr. Quill might be described as its white knight. His articles are published in the *New England Journal of Medicine*<sup>55</sup> and in the *Journal of the American Medical Association*.<sup>56</sup> He takes a much more modest, measured approach, principally supporting physician-assisted suicide.<sup>57</sup>

Interestingly, Dr. Quill's own institution recently reviewed his practices and his proposals, appointing a commission, interdisciplinary in nature and representing all the faculties at the University with any connection to this issue. This body voted *unanimously* in January 1994 to condemn the proposal for physician-assisted suicide.

Obviously, this issue will continue to resurface in all the

competent adults," not just those terminally ill, have the right to doctor-assisted suicides. After negative feedback from its membership, the term "terminally ill" was later restored. *Id.*

<sup>53</sup> See Robert Heiman, *Ethicist Backs Right to Die, not Kevorkian*, EVANSVILLE COURIER, May 18, 1995, at 1A. Dr. Ronald Cranford, a Minnesota neurologist and medical ethicist who has testified in landmark right-to-die cases, including Nancy Cruzan, believes "that it is 'morally appropriate' to withhold or withdraw treatment and let dying patients die." *Id.*

<sup>54</sup> Dr. Quill's works include: *Discontinuing an Implantable Cardioverter Defibrillator as a Life Sustaining Treatment*, AM. J. CARDIOLOGY, July 15, 1994, at 205-07; *Nonabandonment: A Central Obligation for Physicians*, TRENDS IN HEALTH CARE, LAW & ETHICS, Winter 1995, at 25-32; *Physician Assisted Death: Progress or Peril?*, SUICIDE & LIFE-THREATENING BEHAVIOR, Winter 1994, at 315-326; *My Patient's Suicide*, HARPER'S, May 1991, at 32-42.

<sup>55</sup> Dr. Timothy E. Quill, *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, NEW ENG. J. MED., Nov. 5, 1992, at 1380-84. *The Ambiguity of Clinical Intentions*, NEW ENG. J. MED., Sept. 30, 1993, at 1039-40.

<sup>56</sup> Dr. Timothy E. Quill, *Doctor, I want to Die. Will you Help Me?*, JAMA, Aug. 18, 1993, at 870-73.

<sup>57</sup> See Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994). Physicians, including Dr. Quill, brought an action in U.S. District Court challenging the constitutionality of New York Statutes making it a crime to assist a terminally ill person commit suicide. *Id.* at 79. The District Court held that patients do not have a fundamental right to physician-assisted suicide protected by due process and that the New York statute does not violate the Equal Protection Clause of U.S. Constitution. *Id.* at 84.



states through isolated actions by physicians, debate and law-suits.<sup>58</sup> A great number of states have instituted specific provisions prohibiting assisted suicide.<sup>59</sup> Thus, in virtually all states there is some form of criminal prohibition against assisted suicide.

It is possible to find inviting and even reasonable arguments in support of assisted suicide.<sup>60</sup> Very often, however, those arguments that are heard do not reflect the intellectual quality that might be used to bolster support for the euthanasia proposition. For example, this author, having debated Hemlock Society representatives on numerous occasions, was genuinely amazed at the lack of intellectual heft in most of their arguments. Nevertheless, most practicing attorneys who have handled cases involving issues of a nationally divisive nature, while not inclined to change their positions, may experience doubts in

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<sup>58</sup> See, e.g., *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995). Four physicians, a nonprofit organization and three individuals brought suit against the state of Washington asserting that a statute criminalizing assisted suicide violated the U.S. Constitution. *Id.* at 588. The Court held that the statute did not deprive persons seeking physician-aided suicide of their constitutionally protected liberty interest. *Id.* at 594.

The statute reads:

Promoting a Suicide Attempt

(1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.

(2) Promoting a suicide attempt is a class C felony.

WASH. REV. CODE § 9A.36.060 (1995).

<sup>59</sup> *People v. Kevorkian*, 447 Mich. 436, 478 (1994). Presently, a substantial number of jurisdictions have specific statutes that criminalize assisted suicide, and the Model Penal Code also provides for criminal penalties. Further, all states expressly disapprove of suicide and assisted suicide. See, e.g., CAL. PENAL CODE § 401 (Deering 1985); CONN. GEN. STAT. ANN. § 53a-56(a)(2) (1995); N.J. STAT. ANN. § 2C:11-6 (West 1995); N.Y. PENAL LAW § 120.30 (Consol. 1995).

<sup>60</sup> See DEREK HUMPHRY, *FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING* (1991); see also Richard Worsnop, *Aided Suicide an Issue That Just Won't Die*, ROCKY MT. NEWS, June 7, 1995, at 31A.

I have always argued for more and better hospices, more and better pain management. I want as little euthanasia as possible. But ... there will always be some cases, perhaps 10% of [terminal] cases, where the doctor at a certain point just runs out of things to do. It's purely a quality-of-life decision. The doctor is doing his best [but] if the patient's body has deteriorated so much that life isn't worthwhile to them, then they want euthanasia. They want assisted suicide. They want to die ... [a]nd that's not a hospice or a medical decision. It's a highly individual civil liberty.

*Id.* (quoting Derek Humphry).

their own minds as to exactly how the given issue can be treated in a just and fair way. One benchmark for attorneys to focus on is to recall that the Hemlock proposals assault the constitutive values of the medical profession. Another consideration should be the message that adopting such proposals sends to the rest of society.

A picture depicts two fisherman on the shores of the Golden Gate in the late 1920s or early 1930s, when only the two towers of the fabled bridge across the Gate have been finished. One can see the cables being hung for the roadway which eventually will be built. This bridge is a wonder of the world that inspired awe even while it was under construction; even unfinished, it certainly must have been a wonder to behold.

Nevertheless, there exists a dark and tragic side to this wonder — the fact that over decades, a thousand people have leapt from the bridge to their death.

The American Association of Suicidology asserts that aside from just the romantic setting, the bridge has insufficient barriers. It is a very accessible place for those persons who want to take their own lives — tragically accessible. In fact, one person left a simple, plaintive note: “Why did you make it so easy?”

As lawyers and opinion leaders, we have a duty to examine these proposals and to bring them to society’s attention. “Why should we make it so easy?” Do we really want to remove the barriers and make it easier for those who despair of this life — for any reason — to exercise a “right to die?”

